A **DONGGUAN ELOP METAL PRODUCT COMPANY LTD**

v.

ROKONMA (M) SDN BHD

B HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM J
[CIVIL SUIT NO: 22 NCvC-1058-10-2011]
31 JANUARY 2013

C ***CIVIL PROCEDURE:*** *Stay of execution - Consent judgment - Application to stay consent monetary judgment - Whether special circumstances shown - Filing of summons to set aside consent judgment - Whether a ground to grant stay - Application for plaintiff to deposit security for costs - Whether perverse and mischievous - Rules of Court*
D *2012, O. 42 r. 13*

The plaintiff, a company registered in Dongguan province, China, had recorded a consent judgment against the defendant for a sum of RM820,000 on 27 September 2012. The defendant reneged on
E its undertaking to pay the judgment sum, and on 30 November 2012, the plaintiff commenced execution proceedings against the defendant. On 6 December 2012, the defendant filed an originating summons to set aside the consent judgment, and at the same time applied, *vide* encl. 85 herein, for a stay of execution of
F the consent judgment and for the plaintiff to deposit security for costs in the sum of RM35,000 if it sought to dispute the application. Before the learned judge, the defendant argued that a stay pending the disposal of the originating summons ought to be granted as the plaintiff was facing liquidation, and further, had no
G legal capacity to enter into the consent judgment. It was the defendant's stand that the plaintiff's business licence in Dongguan had already expired by 4 January 2012, and that it was not a legal entity when it executed the consent judgment in question. The plaintiff retorted that it was never in liquidation, was still a legal
H entity and that it did not renew the business licence in Dongguan because its business operation had since moved to Huizhou province. It was further averred, in any case, that non-renewal of the business licence could not absolve the defendant from the obligation to make good the accrued debt.

I

Held (dismissing application with costs):

(1) There were no special circumstances to justify a stay of the consent judgment. The mere filing of the originating summons by the defendant to set aside the consent judgment did not operate as an automatic justification for stay of the judgment, just as an appeal from a decision of the High Court to the Court of Appeal in any action does not operate as an automatic stay of execution of a judgment. (paras 5 & 9)

(2) The plaintiff could not be denied the sum under the consent judgment on the ground that it was a foreign company registered in China. Neither should the court require the plaintiff to deposit the security for costs. It was indeed perverse and mischievous of the defendant to apply for the security for costs as encl. 85 was the defendant's own application for stay of the consent judgment. It was just and proper that the plaintiff be allowed to enjoy the fruits of its litigation and not be burdened with more obstacles and costs due to the defendant's reluctance to pay the judgment sum. After all, should the defendant succeed in setting aside the consent judgment through the originating summons, the defendant could recover the sum from the plaintiff. (paras 13, 14 & 16)

(3) The defendant only filed the present application for stay and the originating summons to set aside the consent judgment on 6 December 2012, *ie*, about 69 days after the consent judgment was entered on 27 September 2012. This was certainly too long after the 30 days from the receipt of the Order or judgment allowed under O. 42 r. 13 of the Rules of Court 2012 for the filing of an application to set aside on order or judgment. The fact that the defendant only filed the originating summons after the commencement of execution proceedings showed that the defendant was delaying execution for its own purpose. (paras 14 & 15)

(4) The defendant had not shown any documentary proof that the plaintiff was no longer a legal entity or that its registration or incorporation as a company had been struck off from the register or revoked by the relevant companies' authority in China. In the absence of any cogent evidence to the contrary adduced by the defendant, the court was of the view that even if the plaintiff's business licence had expired on 4 January

2012 as alleged, it remained a legal entity and had the capacity to enter into the consent judgment with the plaintiff. This civil suit, filed on 28 October 2011 while the plaintiff's business licence at Dongguan province was still in force, was for the recovery of a debt due and owing by the defendant from 2008. This court would agree with counsel for the plaintiff that non-renewal of the plaintiff's licence at Dongguan province beyond 4 January 2012 did not absolve the defendant of its obligations to pay the debt accrued to the plaintiff in 2008. (paras 23-27)

(5) In view of the complexity of the issues involved, and the fact that the defendant had not treated the consent judgment with sanctity, costs of RM8,000 was awarded to the plaintiff. (para 28)

Case(s) referred to:

Greenlinx Sdn Bhd & Anor v. Suruhanjaya Syarikat Malaysia [2012] 7 CLJ 490 HC ***(foll)***

Kattayat Mohandas CP Narayana Menon v. Mangalam Sinniah; Harveen Kaur Balbir Singh (co-respondent/party cited) [2011] 1 LNS 494 HC ***(refd)***

Lau Hui Sing & Wong Chuo Yong [2008] 9 CLJ 232 HC ***(refd)***

Summit Parade Sdn Bhd v. The Store Corporation Bhd & Anor [2009] 1 LNS 1357 HC ***(refd)***

Walter Pathrose Gomez & Ors v. Sentul Raya Sdn Bhd [2005] 7 CLJ 385 HC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 42 r. 13

For the plaintiff - Akberdeen Abdul Kadir (Natasha Basheer with him); M/s Akberdin & Co

For the defendant - Gabriel Daniel (Woo Yen Lin with him); M/s Paul Ong & Assocs

Reported by Wan Sharif Ahmad

JUDGMENT

Yeoh Wee Siam J:

Enclosure 85

[1] This is the defendant's application for:

(a) Stay of execution of the consent judgment dated 27 September 2012 by the plaintiff in this action against the defendant until

the final disposal of the Kuala Lumpur High Court Originating Summons No: 24NCvC-3097-12-2012 ("the originating summons") and the stay of execution including seizure and sale at the Shah Alam High Court *vide* Suit No: 37-117(A)-10-2012 (application for execution) No. (MTKL): 37-117-10-2012 together with winding-up proceedings of the company;

(b) Security for costs of RM35,000 be given by the plaintiff or any party which gives instructions to or acts on behalf of the plaintiff if the plaintiff or the said party wishes to dispute this notice of application and such security for costs be paid into court within three days or any period deemed appropriate by the court from the date of the order given;

(c) Costs of the application to be borne by the plaintiff.

[2] The grounds for the defendant's application are:

(a) the defendant had on 5 December 2012 filed the originating summons to set aside the consent judgment dated 27 September 2012 on the ground, *inter alia*, that the defendant has discovered that there is illegality, misrepresentation and mutual mistake of fact;

(b) it is proper for all execution on the consent judgment dated 27 September 2012 be stayed until the final disposal of the originating summons.

(c) other grounds as stated in the defendant's affidavit in support of encl. 85.

Court's Decision On Encl. 85 Given On 22 January 2013

[3] The defendant's application is dismissed. Costs of RM8,000 are to be paid by the defendant to the plaintiff forthwith.

Grounds For The Court's Decision

[4] At the outset, I wish to state that notwithstanding the objection of counsel for the plaintiff to the admission of the written submissions of counsel for the defendant on the ground that they were filed late on 21 January 2013, and not on/before 17 January 2013 as directed by the court, I have read and considered in full such written submissions on the morning of 22 January 2013 just before the hearing of encl. 85. I further allowed counsel for the defendant to orally submit in brief during the same hearing.

[5] The court finds that there are no special circumstances to justify a stay of the consent judgment dated 27 September 2012 ("the consent judgment"):

[6] The civil suit was fixed for full trial on 27 September 2012. On that day, both parties, duly represented by counsel, negotiated the terms for an amicable settlement.

[7] Subsequently, as requested by both parties, I did see the parties in chambers to facilitate a settlement through mediation for about two hours regarding a few outstanding issues such as quantum and payment. After that, the parties went out of the chambers to negotiate further on their own. Finally, both parties came back to chambers to record the consent judgment (exh. A of plaintiff's affidavit in support pp. 19-21).

[8] The defendant contended that the consent judgment may be set aside on the grounds that Soon Kon Yin, the party who signed the consent judgment is not an authorised person to do so on behalf of the plaintiff. The defendant further contended that Soon Kon Yin had misrepresented himself as a director of the plaintiff. His representations are misleading and untrue. Regarding this issue, I agree with the submission of counsel for the plaintiff that, to begin with, from a legal standpoint, Soon Kon Yin's signature on the consent judgment is not even required, but merely out of abundance of caution, Soon Kon Yin signed the consent judgment as authorised by the plaintiff. The plaintiff's principal witness from China, Sun Chun Lai, was present in court and he did not prevent Soon Kon Yin from recording the consent judgment. The defendant's solicitor, Mr. Gabriel Daniel, did not object to Soon Kon Yin's recording of the consent judgment. The defendant and its solicitor are now estopped from raising the objection to Soon Kon Yin signing the consent judgment.

[9] The mere filing of the originating summons by the defendant to set aside the consent judgment does not operate as an automatic justification for stay of the judgment just as an appeal from a decision of the High Court to the Court of Appeal in any action does not operate as an automatic stay of execution of a judgment.

[10] The originating summons has yet to be heard and decided on its merits in the Kuala Lumpur High Court ie NCvC5.

[11] The consent judgment is a judgment for a sum of RM820,000 to be paid in six instalments commencing from 19 October 2012. The consent judgment was breached by the defendant on 19 October 2012 when the defendant did make payment by the six post-dated cheques to the plaintiff's solicitors as agreed. The defendant was required to settle the judgment sum of RM820,000 by 14 December 2012. The consent judgment is a monetary judgment and there are no grounds to justify the stay of such monetary judgment.

[12] In *Walter Pathrose Gomez & Ors v. Sentul Raya Sdn Bhd* [2005] 7 CLJ 385 Abdul Malik Ishak J (as His Lordship then was) held:

> 10. By way of encl. 9, the defendant sought for a stay against a **monetary judgment**. I cannot see how the defendant's appeal would be rendered nugatory if the defendant were to succeed in its appeal bearing in mind that it involved a stay of a monetary judgment. In the event the plaintiffs were to lose the appeal in the Court of Appeal, then the defendant **could easily recover from the plaintiffs what they have lost because the damages could easily be quantifiable and therefore recoverable.** (emphasis added).

(See also *Summit Parade Sdn Bhd v. The Store Corporation Bhd & Anor* [2009] 1 LNS 1357).

[13] Pending the hearing of encl. 85, the court had on 10 December 2012, after hearing both parties, ordered that the sum of RM820,000 be paid into court by the defendant. Since the consent judgment is a monetary judgment I therefore ordered the counsel for the defendant to apply to the court, within three days from the court's decision on encl. 85, for the return of the sum and such sum is to be paid forthwith to the plaintiff through the plaintiff's solicitors. There will be no irreparable or irreversible damage cause by this payment in satisfaction of the consent judgment. After all, should the defendant succeed in setting aside the consent judgment through the originating summons, the defendant can recover this sum from the plaintiff.

[14] The plaintiff cannot be denied the sum under the consent judgment on the ground that it is a foreign company registered in China. Neither should the court now require the plaintiff to deposit the security for costs of RM35,000. For the purpose of

the full trial of the civil suit, the court had on 26 July 2012 ordered the plaintiff to deposit a security for costs of RM80,000 which the plaintiff had duly complied with without any problem (exh. SKY-7 of plaintiff's affidavit in reply in encl. 90). The plaintiff commenced execution proceedings on 30 November 2012. From 19 October 2012 to 6 December 2012 the defendant did nothing. The defendant only filed this application for stay and the originating summons to set aside the consent judgment on 6 December 2012 ie about 69 days after the consent judgment was entered on 27 September 2012. This is certainly long after the 30 days from receipt of the order or judgment allowed under O. 42 r. 13 of the Rules of Court 2012 ("the ROC") for the filing of an application to set aside an order or judgment.

[15] The fact that the defendant only filed the originating summons after the commencement of execution proceedings shows that the defendant is delaying execution for its own purposes.

[16] It is also rather mischievous and perverse of the defendant to apply to this court to order the plaintiff to deposit the security for costs of RM35,000 into court for the hearing of encl. 85 which is the defendant's own application for stay of the consent judgment. The court is of the opinion that it is only just and proper that the plaintiff be allowed to enjoy the fruits of its litigation and not be frustrated and blocked with more obstacles and burdened with more costs due to the defendant's reluctance to pay the judgment sum.

[17] The defendant contended that it had prepared the post-dated cheques and forwarded them to its solicitors to be handed to the plaintiff's solicitors, as per terms of the consent judgment.

[18] However, just before the date of hand over of the cheques, the defendant received information that the business licence of the plaintiff company in China had actually expired on 4 January 2012 and the plaintiff company was in the process of liquidation. The defendant's search confirmed that the plaintiff was incorporated in China on 5 January 1995 and the last date of business allowed was on 4 January 2012 (exh. A of plaintiff's affidavit in support pp. 36 and 41).

[19] The defendant then filed the originating summons on 5 December 2012 after getting the relevant documents obtained from China translated, which was time-consuming.

[20] The defendant's contention now is that when the plaintiff's business licence expired on 4 January 2012 the plaintiff company no longer remained a legal entity. That was the position of the plaintiff when it entered into the consent judgment with the defendant. The defendant submitted that similar to common law, in China, incapacity is one of the vitiating factors that can render a contract void. An instance of incapacity is when the company's business licence has been revoked or expired (see *Introduction to Chinese Law* edited by Wang Cheng Huang and Zhang Xian Chu in tab. 9 of the defendant's bundle of authorities).

[21] The plaintiff averred that it is still a legal entity and is not under any liquidation process. The plaintiff did not renew its licence only at Dongguan province, China from 4 January 2012 simply because the plaintiff's main investor, E & W Engineering Sdn Bhd (Malaysia), is currently investing in Huizhou Elop Metal Products Co Ltd, Huizhou province, China which is where the plaintiff's current business address is located (exh. SKY5 of plaintiff's affidavit in reply). Despite ceasing conducting its conveyor systems business at Dongguan province since 4 January 2012, the plaintiff has maintained the Dongguan province address as its registered address. In fact, defendant has acknowledged that the plaintiff's place of business is at Huizhou, China and not at Dongguan province, (para. 5 of exh. A of the defendant's affidavit in support).

[22] What is important here is that this civil suit was commenced by the plaintiff against the defendant on 28 October 2011 ie at the time when the business licence of the plaintiff at Dongguan province is still effective.

[23] The defendant has not shown any documentary proof that the plaintiff is no longer a legal entity or that its registration or incorporation as a company has been struck off from the register or revoked by the relevant companies authority in China.

[24] The plaintiff averred that it is not only an existing and solvent entity, it is still a tax-payer to the Government of China in 2012, therefore proving its legality (exh. SKY6 of plaintiff's affidavit in reply).

[25] In the absence of cogent evidence to the contrary adduced by the defendant, I am of the view that even if the plaintiff's business licence has expired on 4 January 2012, it remains a legal entity and has the capacity to enter into the consent judgment with the plaintiff.

[26] This civil suit filed on 28 October 2011, while the plaintiff's business licence at Dongguan province is still in force, is for the recovery of a debt due and owing by the defendant from 2008. I agree with counsel for the plaintiff in his submissions that the non-renewal of the plaintiff's licence at Dongguan province beyond 4 January 2012 does not absolve the defendant of its obligation to pay the debt accrued to the plaintiff in 2008.

[27] In this regard, I would highlight a similar position taken in *Greenlinx Sdn Bhd & Anor v. Suruhanjaya Syarikat Malaysia* [2012] 7 CLJ 490 where Mohamad Ariff Yusof J (as His Lordship then was) held:

> After all, *when the claim and counterclaim were filed* the first petitioner *had not been struck off the register.* To that extent *the claim was validly filed and validly contested,* and as such *the process of litigation should be allowed to follow its normal course* in fairness to both parties. I do not believe it will be "just" to allow the proposed intervener to intervene and canvas the argument that it should be allowed to strike out the claim (its own claim) and the counterclaim because the first petitioner is in law non-existent. (emphasis added).

[28] When I dismissed the application for stay, I ordered the defendant to pay the plaintiff costs of RM8,000. I am of the opinion that such costs should be granted since the defendant has not treated the consent judgment with sanctity or honoured its obligations thereunder expeditiously. This sum awarded is just and fair and it commensurates with the amount of work that has to be done in view of the complexity of the issues involved (see also *Kattayat Mohandas CP Narayana Menon v. Mangalam Sinniah; Harveen Kaur Balbir Singh (co-respondent/party cited)* [2011] 1 LNS 494; [2011] 4 AMR 599 and *Lau Hui Sing & Wong Chuo Yong* [2008] 9 CLJ 232; [2008] 5 MLJ 846).

[29] Based on the above considerations, I therefore ordered accordingly.